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CURRENT TOPICS.

The Supreme Court of the United States has just rendered an opinion upon a constitutional question of no small importance. In this case, *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, it decides that, under the power given to Congress to regulate commerce among the several states, control may be exercised over telegraphs, and the laws of states, in conflict with congressional legislation on the subject, are invalid. Accordingly, a law of Florida, giving an exclusive right to a company to maintain a telegraph line in a portion of that state, was held inoperative against a company entitled to the privileges of the act of Congress of July 24, 1866, in relation to telegraphs.

In *Abbott v. Abbott*, 67 Me., the Supreme Judicial Court of Maine hold that a wife, after being divorced from her husband, can not maintain an action against him for an assault committed by him upon her during coverture. The court follow the ruling of the English Queen's Bench, in Phillips v. Barnett, 1 Q. B. D. 436, 3 Cent. L. J. 412. In that case, LUSH, J., remarked: "Now I can not for a moment think that a divorce makes a marriage void *ab initio;* it merely terminates the relation of husband and wife from the time of the divorce, and their future rights with regard to property are adjusted according to the decision of the court in each case." Field, J., said: "I now think it clear that the real substantial ground why the wife can not sue her husband is not merely a difficulty in the procedure, but the general principle of common law that husband and wife are one person;" and Blackburn, J., stated the objection to be "not the technical one of the parties, but because, being one person, one can not sue the other." The reasons given in the American case are, however, much more forcible than the arguments used by the judges in the earlier English case. The objection of PETERS, J. who delivered the opinion of the court, to such an action being allowed to be maintained, are unanswerable. "If such a cause of action," he says, "exist, others do. If the wife can sue the husband, he can sue her. If an assault was actionable, then would slander and libel and other torts be. Instead of settling, a divorce would very much unsettle all matters between married parties. The private matters of the whole period of married existence might be exposed by suits. The statute of limitations could not cut off actions, because during coverture the statute would not run. With divorces as common as they are now-a-days, there would be new harvests of litigation. If such a precedent was permitted, we do not see why any wife surviving her husband could not maintain a suit against his executors or administrators for defamation, or cruelty, or assaults, or deprivations that she may have suffered at the hands of her husband; and this would add a new method by which estates could be plundered. We believe the rule which forbids all such opportunities for law suits and speculations to be wise and salutary, and to stand on the solid foundations of the law."

In one of the inferior courts of Indiana, in the case of *Tranter v. Helphenstine*, an opinion on a question of considerable novelty, and which displayed an unusual amount of study and research, was recently delivered by the presiding judge, MALOTT, J. The question raised was: Has the 29th day of February a legal existence? The Indiana statute provides that the summons shall be served ten days before the first day of the term at which the trial can be had. In this case the summons was served Feb. 25, and the judgment rendered by default on March 7. The defendants insisted that, in consequence of the 29th day of February intervening between the day of the service of summons (Feb. 25) and the first day of the term (March 6) at which the judgment was rendered, there was only nine days' service, and that, consequently, the court acquired no jurisdiction over the persons of the defendants authorizing the judgment, citing Swift v. Toucey, 5 Ind. 196; Craft v. The State Bank, 7 Ind. 219; Kohler Montgomery, 17 Ind. 220; and Porter v. Holloway, 43 Ind. 35. In the first of these cases, a judgment had been rendered in a Mayor's court on Feb. 24, 1852. The stat-

ute allowed an appeal "within thirty days after the rendition of judgment." On March 25, following, the defendant appealed the cause to the Circuit Court. That court dismissed the appeal upon the ground that the appeal was not taken within thirty days. This was held error. In Jacobs v. Graham. 1 Blf. 392; Ryman v. Clark, 4 Blf. 392, and Long v. McClure, 5 Blf. 319, the ancient common-law rule that when time is to be computed from an act done, the day on which the act was done should be included, was recognized and enforced. In Hathaway v. Hathaway, 2 Ind. 513, however, the ancient rule was discarded and the present method adopted, by which, in computing time in such cases, the day on which the act is done is excluded. In Swift v. Toucey, *supra*, the court below evidently adopted the earlier rule, and also included March 25, by which—counting the day the judgment was rendered and February 29—the appeal was held to have been taken on the thirty-first day. The Supreme Court, however, following the latter rule held that the appeal was taken in time; since by counting Feb. 28 and 29 as two days, the appeal was taken on the thirtieth day. This fully disposed of the case. But in the course of the opinion, Stuart, J., incidentally refers to the statute of 21 Hen. III, *de bissextili anno*, and remarks: "This ancient statute, being prior to 4 James I, made in aid of the common law, and not inconsistent with our institutions, *would seem* to be in force in this state." In Craft v. State Bank, *supra*, a note, executed Feb. 25, 1848, at 90 days and payable at a bank in this state, was protested for non-payment on Saturday, May 27—the last day of grace, by counting Feb. 29 as one day, falling on Sunday, May 28. The court held that the note was not payable until May 29, saying: "If the 28th and 29th days of February in the bissextile year are to be reckoned as one day, the demand was premature; otherwise it was not. The question was considered in Swift vs. Toucey, 5 Ind., 196, where it was held that they were to be counted as one day." In Kohler vs. Montgomery, *supra*, the question involved was in regard to the day of presentment for the payment, as in the last preceding case, and the court held the presentment premature by one day and summarily disposed of the case with this statement: "Commercially, February has but twenty-eight days;" citing only Ind. Dig. 763, In Porter vs. Halloway, *supra*, the question was whether a bill of exceptions had been filed in time—the 29th of February intervening—and the court simply adhered to the previous rulings without discussing the provisions of the statute of 21 Hen. III, confessing that that they did not know its exact language.

For the reason that the Indiana decisions on the subject rest upon the *obiter dictum* in Swift v. Toucey, and that the statute 21 Hen. III had never been examined by the supreme court in any of the cases decided, the learned judge considered himself at liberty to look into the question independently of the ruling of the supreme court. "First," said the court, "as to the proposition that 'commercially, February has but twenty-eight days.' If it be true that, by the rules of the law-merchant, February has but twenty-eight days, it is reasonable to presume that, in some of the numerous and exhaustive works upon bills, notes and commercial law, the rule would be found laid down as a part of that law. I have pretty thoroughly examined the English and American reports and digests, and have found no case holding that doctrine. It is not found in the works of Kent, Story, Parsons, Byles or Daniels. In Edwards on Bills, 513, it is stated that February 28 and 29 count as one day; but the author cites only the statute 21 Hen. III and a local statute of New York, in support of it. In Chitty on Bills, a large number of British statutes are cited, but the statute 21 Hen. III is not even referred to. But the learned author inferentially controverts the doctrine declared in Kohler v. Montgomery. He says: 'On a bill dated the 28th, 29th, 30th or 31st of January, and payable one month after date, the time expires on the 28th of February in common years, and in the three latter cases, (January 29, 30 and 31), in leap year on the 29th.'" After a critical examination of the English statute, the court decided that it was intended to settle the "year and a day" within which time certain acts in the English practice were required to be performed; that it dealt with the year as an entirety and had no relation to fractional parts of the year, whether expressed in days or months. "No one would think," said the court, "that the statute in question required that the 28th and 29th days of February should be regarded as

having only twelve hours each. Is a man who works on February 28 and 29 to have pay for one day only? Is one who borrows money on February 27, for one day only, entitled to the use of it for one day longer, and that, too, without interest? Has a judgment rendered February 28 no priority as a lien over one rendered February 29th? Could a man sentenced to be hung on February 29, be legally executed on February 28th? Could a man, indicted for selling whiskey on Sunday, February 29th, escape punishment on the plea that he sold the liquor on the latter part of Saturday, February 28?" The service was therefore held to be sufficient.

THE SECOND VOLUME OF THE "AMERICAN DECISIONS."

The decisions in Mr. Proffatt's second volume cover eight years, from the year 1800 to the year 1808, and embrace twenty volumes of reports, from the states of Massachusetts (1 Mass.), Connecticut (1 & 2 Day), New York (3 Johnson's Cases, 1, 2 & 3 Caines Rep., 1 & 2 Caines Cases), New Jersey (1 Pennington), Pennsylvania (3 & 4 Yeates, 1 Binney), Maryland (1 Harris & Johnson), Virginia (3, 4 & 5 Call), North Carolina (2 Haywood, 1 Conference), South Carolina (1 Brevard, 2 Desaussure), and Kentucky (1 Sneed).

Tuttle v. Russell, 2 Day, 201, (Connecticut 1802–1807), 2 Am. Dec. 89, decides that a witness may be impeached by showing that, at the time the facts sworn to occurred, he was intoxicated. But the intoxication, it appears, must be proved by direct evidence, or by the acts and conduct of the witness, and not by the quantity of spirituous liquor he had previously drunk. *Gardner v. Preston*, in the same volume, was an action against A, B and C, founded on a fraudulent combination by them to defraud such merchants and traders as they might be able to impose on by representing A, who was insolvent, as a man of large property and safely to be trusted. It was held that evidence that the defendants made such representations to other persons than the plaintiff, in consequence of which such persons, without the request of the defendants, recommended A to the plaintiff, whereby he was induced to give him credit, was admissible. This case has been subsequently cited and approved in Thompson v. Rose, 16 Conn. 71, and in Luckey v. Roberts, 25 Conn. 492.

Slander and libel cases are both frequent and varied in this volume. In *Lewis v. Hawley*, 2 Day, 495, 2 Am. Dec. 121, to say of a drover whose business was to purchase cattle, drive them to market and sell them; "He is a bankrupt and is not able to pay his just debts," was held actionable without proof of special damage. In *Riggs v. Denniston*, 3 Johns. 198 (New York, 1802–1804), 2 Am Dec. 145, the plaintiff was a counselor-at-law and commissioner of bankruptcy. The defendant had published of him that he was a misanthropist, a virulent partizan, and that he defeated nearly one-third of all the unfortunate debtors that had been before him, first stripping them of every cent they had in the world, and then depriving them of the benefit of the act; and that in his position as counselor-at-law he had received a fee from his client, and then had offered himself as a witness against and in order to divulge the secrets of his client. On demurrer to the defendant's pleas, it was held, as to the first charge, that, in order to justify, the defendant would be obliged to show to a certainty that the plaintiff had willfully perverted the law for illegal and oppressive purposes; and, as to the second charge, that the defendant must prove that the matters communicated to the plaintiff by the client were pertinent to the merits of the cause in which he was engaged. In *Hopkins v. Beedle*, 1 Caines, 347 (New York, 1803–1805), 2 Am. Dec. 191, the declaration in an action for slander contained three counts. In the first, the charge was for saying: "You have sworn to a lie, and I will prove it." In the second: "You have sworn to a lie." And in the third: "You have perjured yourself as one of the overseers of the town of Washington, and I can prove it." The objection that the words in the first and second counts were not actionable in themselves was sustained by the court. Kent, J., said: "Swearing to a lie does not necessarily imply that the party has, in judgment of law, perjured himself. It may mean that he has sworn to a falsehood without being conscious at the time that it was a falsehood. It may mean extra judicial swearing, and, therefore, it is held that a charge that one is forsworn is not actionable, because it shall not

be intended in a case where perjury may be committed. On the other hand, a charge that one is perjured is actionable; for that implies the direct legal crime." So in *Pelton v. Ward*, 3 Caines 73 (New York, 1803-1805); 2 Am. Dec. 251, the words "You swore to a lie *for which you now stand indicted*," were held actionable; and in *Miles v. Oldfield*, 4 Yeates 423 (Pennsylvania, 1800-1803): 2 Am. Dec. 412, the words, "She is a vagrant." *Cook v. Barkley*, 1 Pennington 169; (New Jersey 1804-1807); 2 Am. Dec. 343, is a lengthy and well discussed case, which holds that in actions for slander the defendant may give in evidence, under the general issue, in mitigation of damages, the manner and circumstances of speaking the words; that they were in circulation and reported by others, and that he only repeated them. In *McMillan v. Birch*, 1 Binney 178; (Pennsylvania 1804-1808); 2 Am. Dec. 426, it is held that to call a clergyman a drunkard is actionable. See on this point Hayner v. Cowden, 3 Cent. L. J. 716. We can not help feeling flattered in observing that to the report of *McMillan v. Birch* the editor of the American Decisions has added a note on the subject of Privileged Expressions, which we recognize as a portion of our article on "The Privilege of an Advocate," published in this journal on the 26th of January, 1877. Our satisfaction might, however, have been somewhat greater had its source been acknowledged in a work of the permanent character of this series of reports.

People v. Barrett, 2 Caines. 304 (New York 1803-1805); 2 Am. Dec. 239, holds that the discharge of the jury, after the prisoner has pleaded to the indictment and the jury has been sworn, is a virtual acquittal of the prisoner, who can not afterwards be tried on the same indictment.

The syllabus to *Jordan v. Meredith*, 3 Yeates 318 (Pennsylvania 1800-1808) 2 Am. Dec. 373, is as follows: "The usage of plasterers to charge half the size of the windows, at the price agreed on, for work and materials is unreasonable and bad," because, as remarked by the court, "to charge an employer with materials never received is the height of injustice." The reporter's note to this case states that this decision was criticised in Walls v. Bailey, 49 N. Y. 464. In Coxe v. Heisley, 19 Pa. St. 247, it is said: "Our own decisions on this subject have not been very consistent. The court in the early cases stood over the law and guarded it against invasion faithfully enough. A rule among merchants to charge interest for goods sold after six months, 1 Dall. 265; a usage of plasterers to charge for their work at a certain rate, 3 Yeates 318; a custom to reenter for a forfeiture incurred by non-payment of rent, 6 Binn. 417. All these were held inadmissible. But in 1822 a custom on the Ohio river was permitted to vary the responsibility of a carrier there, 8 Serg. & R. 533; and nine years latter a usage in Philadelphia was allowed to add a warranty to a contract of sale, which, in fact and in law, did not embrace one; 3 Rawle. 101. In both these cases, Chief Justice Gibson dissented from a bare majority; and his warning, though unheeded at the time, was remembered when the question came up again; 3 Watts 179; 5 Barr. 42. Our latest decisions are consistent with the oldest. The law of Pennsylvania may, therefore, be considered as settled in accordance with reason and with the judicial authorities of other commercial states. A local usage, if it be ancient, uniform, notorious and reasonable, may enter with and become part of a contract, which is to be executed at the place where the usage prevails; but here, as elsewhere, it is checked by this wholesome limitation that it must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract."

Sexias v. Woods, 2 Caines 48 (New York 1803-1808); 2 Am. Dec. 215, though modified by later decisions, is a leading case in New York on the question of implied warranty on the sale of chattels. It was an action on the case for selling peachum wood for brazilletto, the former being almost worthless, the latter very valuable. The defendant had received the wood from a house in New Providence, whose agent he was, and it was described in the invoice, advertised and sold by him as brazilletto. Neither of the parties suspected that the wood was other than brazilletto, and no fraud was charged. The court held, following the leading English case of Chandelor v. Lopus, 2 Cro. 4, that no action lay in the absence of an express warranty or fraud on the part of the vendor. This decision, it appears from the reporter's note, was followed in the later cases of Holden v. Dakin, 4 Johns. 421; Sweet v. Col-

gate, 20 ib. 196; and Hotchkiss v. Gage, 26 Barb. 141; but the principle there announced was greatly modified in Hawkins v. Pemberton, 51 N. Y. 198, and in Dounce v. Dow, 64 N. Y. 411.

The case of *Respublica v. Dennie*, 4 Yeates, 267 (Pennsylvania, 1800–1808), 2 Am. Dec. 403, serves to remind the reader that, in reading the pages of this volume, he is studying the records of the past. The defendant was indicted for having in a newspaper called the *Portfolio*, "falsely, maliciously, factiously and seditiously, made, composed, wrote and published," a libel against the government of the United States, as follows: "A democracy is scarcely tolerable at any period of national history. Its omens are always sinister, and its powers unpropitious. With all the lights of experience before our eyes, it is impossible not to discover the futility of this form of government. It was weak and wicked at Athens, it was bad in Sparta, and worse in Rome. It has been tried in France and terminated in despotism. It was tried in England, and rejected with the utmost loathing and abhorrence. It is on trial here, and its issues will be civil war, desolation and anarchy. No wise man but discerns its imperfections; no good man but shudders at its miseries; no honest man but proclaims its fraud; and no brave man but draws his sword against its force. The institution of a scheme of polity so radically contemptible and vicious is a memorable example of what the villainy of some men can devise, the folly of others receive, and both establish, in despite of reason, reflection and sensation." Mr. Dennie seems, from this extract, to have been a powerful writer, and it is rather surprising to find that he was acquitted by the jury.

Want of space alone prevents us from extending this notice of the cases of interest in Mr. Proffatt's second volume. No lawyer can look through the book without experiencing both pleasure and profit in its perusal.

THE statistics relating to the administration of criminal law in France during the year 1875 have just been made public. The number of persons tried at the Assizes during the year 1875 amounted to 4,791, as against 5,228 in 1874. Of the accused 1,547 were described as wholly illiterate. 3,042 could read and write; 202 had received a superior education. The men were 4,008, the women 783. The acquittals were 947, or over 20 per cent.

FOREIGN CORPORATIONS — SERVICE OF PROCESS.

FONDA V. THE BRITISH AMERICAN ASSURANCE CO.

United States Circuit Court, Eastern District of Michigan, April 1, 1878.

Before Hon. H. B. BROWN, District Judge.

A RESOLUTION OF A FOREIGN CORPORATION, filed pursuant to a state statute, authorizing its agent "to acknowledge service of process for and in behalf of such company, and consenting that service of process upon any agent shall be taken and held to be as valid as if served upon the company or association," amounts to an agreement for a constructive presence within such state; and a federal court may obtain jurisdiction over such corporation by service upon its agent.

On motion to set aside the summons, upon the ground that defendant was a foreign corporation organized under the laws of the province of Ontario, and, therefore, not suable in this court.

C. E. Warner, for motion; *H. E. Windsor*, *contra*.

BROWN, J.:

This is an action brought by a writ of summons, in which the defendant is described "as a body corporate, organized and existing under the laws of Ontario, in the Dominion of Canada, and an alien and a subject of the Queen of Great Britain and Ireland." The motion raises the question of the jurisdiction of this court over the defendant, and is based upon the fact that it is not an inhabitant of, or found within this district.

The first section of the act of 1875, following in this respect the language of the judiciary act, provides "that no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of the serving of such process, or of commencing such proceeding, except as hereinafter provided." A series of decisions of the supreme court has settled the law that a corporation is only a citizen of the state by which it is created; that it is a mere creature of local law, and has not even an absolute right of recognition in other states, but depends for that, and for the enforcements of its contracts, upon the assent of those states, which may be given upon such terms as they please. Bank of Augusta v. Earle, 13 Pet. 519; Paul v. Virginia, 8 Wall. 168; O. & M. R. R. Co. v. Wheeler, 1 Black. 286; R. R. Co. v. Harris, 12 Wall. 81. Accordingly, it has always been held that a foreign corporation was not an inhabitant of any district except that within which it was incorporated, and that service upon its officers in another district was not a finding of the corporation in that district, within the meaning of the judiciary act. Day v. Newark India Rubber Mnfg. Co., 1 Blatch. 628; Main v. Second National Bank, 6 Biss. 26.

If the service of the summons in this case is supported at all, it must be by virtue of the statute of this state, which provides that every foreign insurance company shall file with the secretary of

state a resolution, authorizing any agent, duly appointed by resolution, under the seal of the company, to acknowledge service of process for, and in behalf of such company, "consenting that service of process upon any agent shall be taken and held to be as valid as if served upon the company or association, according to the laws of this state or any other state, and waiving all claim of error by reason of such service." That such service is valid and regular, has not only been repeatedly recognized by the supreme court of this state, but was held to be valid as applied to process from the state courts in the case of the Lafayette Ins. Co. v. French, 18 How. 404. It is true the question was not discussed whether such service would be valid as applied to process of the federal court, but there is no intimation that it would not be so considered. In the case of The Railroad Company v. Harris, 12 Wall. 81, the supreme court observed in speaking of a foreign corporation: "It can not migrate, but may exercise its authority in a foreign territory, upon such conditions as may be prescribed by the laws of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly." The question at issue here, however, was not directly passed upon in that case. In Pomeroy v. The N. Y. & New Haven R. R. Co., 4 Blatch. 120, it was held that the provision in the judiciary act above quoted could not be altered or modified by any state law, and that the law of New York in regard to a Connecticut corporation, declaring it liable to be sued in the same manner as corporations created by the laws of New York, and that process might be served on the officers or agent of the corporation, would not have the effect to give the federal court jurisdiction of a suit against such corporation by service within the district on an officer or agent.

I am better satisfied, however, with the opinion in the case of Knott v. The Southern Life Ins. Co., 2 Woods 479, in which jurisdiction in a similar case was sustained. It seems to me the very object of the state law was to provide that no insurance company should do business within the state that was not capable of being sued there, and that the constructive presence of a corporation in the person of its agent should be recognized as well by us as by the state courts. The cases holding that a corporation is a citizen only of the state in which it is organized, are quite as applicable to state courts as to federal courts, and would be as effectual to prevent a foreign corporation being sued in the state courts of another state as in the federal courts. Now, if statutes like this may be held to constitute a constructive presence of the corporation in another state for the purpose of the service of process from the state court, I see no reason why it should not operate equally in favor of process from this court. And if a foreign corporation may appear after the issuing of process and defend a suit, (of which no doubt was ever entertained), it is difficult to see why it may not agree beforehand that it will accept service of all process that may be served upon it. In this particular the case of Day v. Newark India Rubber Co., above cited, differs from the one under consideration—there was no express agreement on the part of the corporation to accept service—the jurisdiction could only be sustained upon the theory that the acceptance of the franchise implied an agreement to be bound by the conditions of the statute.

With deference to conflicting opinions, the reasoning of Judge Woods in the case cited from his reports seems to me unanswerable, and for the present I shall act upon it as the law in these cases.

MORTGAGE — CONDITION TO INSURE — RIGHT OF MORTGAGEE UNDER POLICY TAKEN BY MORTGAGOR.

STEARNS V. QUINCY INSURANCE COMPANY.

Supreme Judicial Court of Massachusetts—October Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT,
" OTIS P. LORD,
" AUGUSTUS L. SOULE,
} Associate Justices.

The mortgagee named in a mortgage of real estate, containing a condition that the mortgagor shall keep the buildings thereon insured for the former's benefit, in a sum named, at such offices as he shall approve, can not maintain an action in the mortgagor's name against the insurer, upon a policy issued to the mortgagor for a smaller sum, and covering both the real estate and certain personal property of the mortgagor, although the insurer has been notified, before payment to the mortgagor, of the mortgagee's claim.

The facts appear sufficiently in the opinion.

COLT, J., delivered the opinion of the court:

This is an action to recover upon a policy of fire insurance on the plaintiff's dwelling-house and furniture. It is brought in the name of the plaintiff, by Andrews, who claims to have an equitable lien upon the money due on the policy, to the extent of his interest as mortgagee of the real estate. This claim on the part of Andrews is founded on a clause in the condition of the mortgage from Stearns, the plaintiff, to him, which declares that if the mortgagor shall, until payment of the debt secured, keep the buildings standing on the land insured against fire, for the benefit of the mortgagee, at such offices as he shall approve, and perform the other conditions named, then the deed shall be void. At the time the policy was issued, the insurance company had no knowledge of the terms of the mortgage, although in the month of June before, they did know that Andrews had a mortgage on the property. The policy, when taken out, was kept by Stearns, until after the fire, and was never delivered to Andrews; nor was there any agreement between them in reference to insurance, or any assignment either of the policy or of the claim against the company for the loss, either before or after the fire, except that which is implied in the condition of the mortgage. It does not appear that Andrews approved of the

insurance in this company, or had any knowledge of it until after the loss.

After the fire Andrews gave notice of his claim to the company, but they paid the amount of the loss to Stearns before this action was brought. This payment is claimed by Andrews to have been wrongfully made; and the question is whether Andrews, suing in the name of the plaintiff at law, can also recover the same to his own use and benefit.

The plaintiff relies on the rule that, when a promise is made by one person to procure insurance upon property in which another has some interest, for the benefit of the latter, and then with the intention of performing his promise, obtains a policy of insurance in his own name, the party intended to be benefited will have an equitable lien on the policy and its proceeds which he may enforce against the insurer, or the promisor, or may maintain against the creditor of the latter. This rule and the lien thus created, it is said, will be regarded and enforced both at law and in equity.

In Providence County Bank v. Benson, 24 Pick. 204, a party expressly agreed to obtain insurance, for the benefit of the owner, on a quantity of wool at his mill, then in process of manufacture. He accordingly obtained such insurance in his own name, but as the case found, with the sole purpose and intention of performing his agreement; and before the loss he informed the owner of the wool that he had effected the insurance as agreed. It was decided that the owner had an equitable interest in the policy, which was equivalent to that of an assignee of a chose in action, and was sufficient to enable him to hold the avails against an attaching creditor of the party in whose name the policy was issued. The fact that, in the transaction, there was an intention to comply with the agreement in effecting the insurance, and the fact that the owner was informed of it before the loss, are recognized in the opinion of Dewey, J., as important elements in the decision of the case. In Hazard v. Draper, 7 Allen, 266, such a lien was enforced by suit in equity in a case when, after the loss, the policy was delivered to a third person in trust to collect the insurance-money, and pay the mortgage debt out of it. In Nichols v. Brybee, 5 R. I. 34, cited by the plaintiff, which was a bill in equity to enforce such an equitable lien, the policy of insurance was in existence at the time the mortgage was made, and conformed in amount to the required insurance. The bill was sustained, but the court found as a fact that it was the intention of the parties that this particular policy should be assigned to the mortgagee, in performance of the agreement to insure. And in Cromwell v. Brooklyn Ins. Co., 44 N. Y. 42, it was said that it must be inferred from the facts in the case, in the absence of anything to the contrary, that the insurance then in question was made in pursuance of the previous agreement to insure.

In all the cases found, which will support this claim of the mortgagee to insurance obtained by the mortgagor in his own name, the facts were such as to justify the conclusion, by estoppel or otherwise, that such insurance was obtained by the latter as agent of, or with intent to perform the obligation he had assumed to the former.

It is said that an executory agreement alone will not amount to an equitable assignment of a chose in action, or of property not then in existence; some agreement or delivery after it comes into existence must be shown. Moody v. Wright, 13 Met. 17, 32; Palmer v. Merrill, 6 Cush. 282. A mere promise to pay a debt out of a particular fund, is not an assignment even in equity. There must be an actual and constructive appropriation of the subject-matter in favor of the party to be benefited. Christmas v. Russell, 14 Wall. 70. And in Mornington v. Keane, 2 DeG. & J. 291, 317, which was a bill in equity to enforce a charge on real estate, created by a covenant in a separate deed, it was said that an equitable lien is created by covenant only; first, when the covenant refers to particular property, or, second, when property has been acquired with an intention to perform or satisfy the covenant; and this intention must be an actual intention existing in fact.

In the case at bar, the facts agreed do not justify the inference that this policy was obtained with the intention, at the time, to perform the condition in the mortgage. That condition required insurance on the dwelling-house only, in a sum not less than $3,200, for the benefit of the mortgagee, at such offices in Massachusetts as he should approve. This insurance was obtained without his approval or knowledge, more than a year after the mortgage was made, for $2,000 in all, $500 of the same being on the mortgagor's personal property not covered by the mortgage, and only $1,500 on the house. Both mortgagor and mortgagee had an insurable interest in the property, and each had the right to protect himself from loss by his own contract of insurance. So far as these facts go, the inference is that Stearns intended to insure only his own interest in the house as well as in the personal property, and the important element is lacking which is necessary to establish the claim of Andrews.

There is another view of this case which leads to the same result. For, assuming that Andrews has an equitable claim to that part of the policy which covers the house, yet it is one which he can not enforce in a suit at law on the policy in the name of Stearns, the mortgagor, because the latter must have an equal right to recover his share in such an action, and the company would be required to pay over the loss by instalments to different persons, and be subject to two suits for the same cause of action in favor of the same plaintiff. Palmer v. Merrill, 6 Cush. 287; Gibson v. Cook, 20 Pick. 15.

Judgment for defendants.

THE following statement of the legal modes of accepting bills in Europe may be of interest: "Denmark and Sweden—Acceptance is expressed by the word 'accept' written on the bill itself, and followed by the signature of the drawee. Netherlands and Portugal—The acceptance must be clearly expressed in the bill itself, and must be written and signed by the acceptor. Russia—The acceptance is expressed by the word 'accepted' written on the bill itself, followed by the signature of the acceptor. Spain—The acceptance must be written."

LIEN—INNKEEPER—CONVERSION.

MULLINER V. FLORENCE.

English Court of Appeal, January 26, 1878.

1. AN INN-KEEPER HAS A LIEN upon his guest's horses and carriages, as well as upon his guest's personal luggage, for the whole of his bill for the guest's entertainment, and not merely for the keep and care of the horses and carriages.

2. IF AN INNKEEPER SELLS GOODS upon which he has a lien, the lien is broken, and he is guilty of a conversion, for which the owner of the goods can maintain an action against him, and recover the whole of the proceeds of the sale as damages.

This was an appeal of the plaintiff from the judgment of Pollock, B., at the trial of the cause before a special jury at Warwickshire Summer Assizes, 1877.

The plaintiff was a coach-builder at Leamington, and the defendant was an hotel-keeper at Coventry. In October, November and December, 1876, a person named Bennett was staying at defendant's hotel, and while there bought of the plaintiff a pair of horses and a wagonette and harness, and had them sent to the defendant's hotel. In January, 1877, Bennett absconded from the defendant's hotel without paying his bill; he was afterwards arrested, tried at Warwick Assizes, and sentenced to seven years' penal servitude.

The plaintiff, not having been paid for the horses and carriage and harness, applied to the defendant to return them to him, when the defendant claimed to retain them until his bill against Bennett was paid. The plaintiff offered to pay the expenses of the horses' keep, but refused to satisfy any other part of Bennett's account. On the 6th of February, the plaintiff obtained an assignment from Bennett of the horses and carriage and harness, in consideration of being released from the price for them. The plaintiff's solicitors then served formal notice of the assignment on the defendant, and demanded the return of the goods, tendering £20 for the keep of the horses. The defendant still refused to deliver up the goods, and on the 9th of February caused the horses to be sold by public auction, when they fetched the sum of £73.

Sir J. F. Stephen, Q. C., and *Dugdale*, for the plaintiff. First, the defendant's lien was particular, not general. There is no case exactly in point, but the earlier cases favor the notion that the lien was particular. As a general principle of law, a lien is always particular, unless it be made general by some exceptional incident, such as custom. Where the nature of the thing kept is such that it causes some definite and distinct expense and responsibility to the innkeeper, there the lien is particular. Moss v. Townshend, 1 Bulstr. 207; Rosse v. Bramsteed, 2 Rolle, 438; Jones v. Pearle, 1 Strange, 556; Robinson v. Walter, 3 Bulstr. 269; Stirt v. Drungold, 3 Bulstr. 289. [BRETT, L. J.—The innkeeper certainly can not keep them in respect to former accounts.] Threfall v. Borwick, 23 W. R. 312, L. R. 10 Q. B. 210; Broadwood v. Granara, 3 W. R. 25, 10 Ex. 416; Turrill v. Crawley, 13 Q. B. 197. Secondly, the sale of the horses by the defendant was wrongful: Jones v. Pearle, notes to Coggs v. Bernard, 1 Smith L. C., vol. 1, 7 ed; Thames Ironworks and Shipbuilding Company v. Patent Derrick Company, 8 W. R. 408; Donald v. Suckling, 15 W. R. 13 L. R. 1 Q. B. 585; Story on Equity Jurisprudence, 12th ed., secs. 1216, *et seq.*; Legg v. Evans, 6 M. & W. 36; Clark v. Gilbart, 2 Bing. N. C. 343: Jacobs v. Latour, 5 Bing. 30; Jones v. Thurloe, 8 Mod. 172; Hartley v. Hitchcock, 1 Stark. 408.

Mellor, Q. C., and *Graham*, for the defendant.—The cases do not decide the question one way or another. In Turrill v. Crawley, the court would not decide it, but Mr. Justice Coleridge pointed out that the innkeeper's lien has been extended. It can not matter that the carriages and horses are kept in another part of the inn. The landlord looks as much to them as guarantee for the payment of his bill as he does to the guest's personal luggage. There is only one contract. If two men furnish evidence that they are joint guests, their goods are jointly liable. Secondly, as to the sale, if we can not sell, our lien is worthless. The owner of a lien may sell at a reasonable time. Even supposing we were wrong in selling, the measure of damages is only nominal. The plaintiff should have tendered the amount due to us. Lien in this respect ought to stand on the same footing as pledge. Donald v. Suckling; Halliday v. Holgate, 17 W. R. 13 L, R. 3 Ex. 299; Johnson v. Stear, 12 W. R. 347, 15 C. B. N. S. 330; Jones v. Tarleton, 9 M. & W. 675. [BRAMWELL. L. J., referred to Chinery v. Viall, 8 W. R. 629, 5 H. & N. 288.] That case shows that if the value of the lien here had been less than the amount of the bill delivered, the plaintiff would have been entitled to recover the difference. The value of the goods is not always the measure of damages in trover. [BRETT, L. J. There the bill of sale had passed the property to the defendant; the plaintiff had only a right of possession. BRAMWELL, L. J. And it was clearly an action of trespass only.] As to the point of this being a pledge of the goods having been abandoned, even if it was, the court can entertain it now: ord. 40, r. 5. If this can be considered a pledge, no action will lie. Halliday v. Holgate,

BRAMWELL, L. J:

There are a good many questions that arise in this case. The first is, was the innkeeper's lien a lien on the horses for the charges in respect of the horses; on the carriage for those in respect of the carriage, and on the guest's clothes and other personal luggage for the guest's own personal expenses? or was it a lien upon all the three classes of goods with respect to the conjoint expenses of horses, carriage and guest? I am of opinion that it was the latter, for this reason: It seems to me that the debt in respect of which the lien is claimed was one, though made up of several items. An innkeeper is not bound to trust his guest. He may demand a reasonable compensation before he is liable to entertain any traveler; but if he does trust him, takes his luggage and horses and carriage in, and finds him in the things which he

wants for himself and his horses and carriage, it is one contract, and the lien is a lien for the due performance of the contract to pay. If that is not the case, almost ludicrous consequences might follow. A man might go to an hotel with his wife and daughter and friend, and then it might be said there was a lien upon the guest's luggage for what he had consumed, upon the wife's for what she had, and so on That can not be. The guest, and horses, and carriage are received and provided for as one transaction, so that no item is severable in any way from the others. It does not seem to me that the sum to be paid is got at by putting down so much for a certain person or thing, so much for guest, horse, carriage. The presumption of law, it is true, is against the general lien—that is to say, if you send goods to a dyer, to whom you owe money for a previous dyeing, he does not acquire a lien upon them, both in respect of this last transaction, and the debt incurred before these goods were sent. One can see the reason; a lien is a matter of contract. But in order to justify the argument raised in this case, some authority ought to be shown that, if there are fifty pieces to be to be dyed for fifty shillings, there is a lien upon each separate piece for each separate shilling, which can not be, because there is only one contract.

But upon the other part of the case I can not agree with the conclusion that Mr. Baron Pollock came to. Upon the authorities the defendant had a lien which he was able to justify. But he was not justified in selling; he was guilty of a conversion in doing so, and thus has enabled the plaintiff to sue him and to maintain this action for that wrongful conversion. Every notion of the lien seems to suppose that, if you part with the possession of the thing, your lien is gone, and if you affect to dispose of the goods for your own benefit, you are guilty of a tortious act. A man need not keep the goods upon his premises, but he must not dispose of them, nor attempt to give a right to them to somebody else; because, a lien being a right to the possession of goods till something is done, every parting with them gives up the lien, and if committed with the intent of giving the property to somebody else, is tortious. The defendant had no right to use the horses, neither to ride nor to drive them; yet it is suggested that he could give a right to somebody else to do so. It is common knowledge that a lien is a thing a man can only avail himself of by keeping it as such. None of the cases are inconsistent with our view. The cases mainly cited were Donald v. Suckling and Johnson v. Stear. In Johnson v. Stear it was held that a sale by a pledgee was tortious, and that an action would lie. But, looking at the substance in that case, and in Halliday v. Holgate, in all these three cases the courts held, or managed to hold, that the pledgee had indeed exceeded what he had a right to do; but that, inasmuch as he, the pledgee, could have transferred his interest—that interest that he had by the pledge—to another person, it was different from the lien, as the act of handing over the pledge was not tortious, but could have been justified under the pledgee's title (except in Johnson v. Stear), because the pledgee had a right to hand it over; and, that being so, inasmuch as all that was done by handing over and dealing with the goods might have been done properly, if done in a different way, it does not vest the thing in the pledgor, so as to give him a right to maintain an action for it. In the other cases, it was held that there was no right for the owner to receive back the articles without tender of the amount for which they were pledged. In that case there was an interest in the pledgee which could be assigned. A lien can not, and it is clear this was a tortious act.

Now, we come to the damages. As a general rule, when a man tortiously converts property to his own use, as he does by selling it and receiving the price, he is liable for the value of the article to the person whose property it was. The first case urged to the contrary is Chinery v. Viall, where I delivered the judgment of the court. As to that case, it is distinguishable from this on the ground that there were special circumstances. If a vendor tortiously sells the same goods to a second vendee, inasmuch as, according to the authorities, he could maintain no action against his first vendee, it followed, in that case, that the same act of the defendant that was tortious relieved the plaintiff from paying the price. Therefore, the plaintiff gained certainly as much as he lost. I am not going to cast any doubt upon it. Brierley v. Kendal, 17 Q. B. 937, was an action for trespass to goods, in which Mr. Justice Wightman, in the course of the argument, says that, if a man had a right of possession for a month only, he might maintain an action for a trespass or conversion; but is he to recover the full value? It would be very odd if he could; because the reversionary owner might too. Then Johnson v. Stear was relied on, upon which I wish to say a word or two only. The court there held that the action was maintainable for conversion. I see Lord Blackburn in his judgment in Donald v. Suckling seems to doubt whether that is quite right, because what he says is: "This can be reconciled with the cases above cited, of which Fenn v. Bittleston, 7 Ex. 152, is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract of pledging as to amount to a repudiation of it, though I own that I do not find this distinction in Johnson v. Stear. It may be that the conclusion from these premises ought to have been that the defendant was entitled to the verdict on the plea of not possessed in trover, unless the court thought fit to let the plaintiff on proper terms amend by substituting a count for the improper sale; but this point as to the pleading does not seem to have been presented to the Court of Common Pleas." So that Lord Blackburn makes a doubt whether the judgment was right there in giving a verdict even for nominal damages. But supposing it was, the plaintiff had no right to substantial damages. One may say with great respect that the Court of Common Pleas has come to a right conclusion upon wrong premises. But I am not going to adopt Lord Blackburn's *dictum* against the judgment of the

Common Pleas. The Common Pleas expressly give the reason that there was a sort of right in the defendant. If so, it did not justify him in parting with the goods at the time he did. Nevertheless it must be taken into account in assessing the damages. For that reason the case is not at all applicable to the present one. Mr. Justice Williams' remark is very strong and apt: "The true doctrine, as it seems to me, is that, whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover, which stands in the place of such resumption. In the present case, I think it plain that, the bailment having been determined by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully, when so resumed, as the absolute owner against all the world." Now here, in this case, if this plaintiff had thought fit after the sale to go to the vendee and say, "Those are my horses, and though you have bought and paid for them, you have bought them of a man who had no right to sell them," it is clear he could have maintained an action against that vendee and for their full value. He has thought fit not to do so, but to treat the act of the defendant as a conversion; and he can not be worse off because he brings this action, than if he had brought one against the defendant as vendee. The law is not so unreasonable, if the defendant was not bound to feed them. He might have said to the plaintiff, "Pay the debt and you will get them back." It is quite certain that, in the case of distress before the power of sale was given, if a man had sold the distress, he would have been liable for the full value of it. It seems to me, with great respect to Mr. Baron Pollock, that this part of his judgment was wrong; and, as the minimum damages are £73, I think we ought to reverse the judgment and give the plaintiff £73. But inasmuch as the lien was upon the carriage for the whole bill, and the amount was not tendered, so far the defendants are entitled to retain the judgment they have got.

As to the pledge, that point is given up. But in addition I am of opinion that there was no evidence to go to the jury of a pledge; and if the judge had left it to the jury, he would have been wrong. Nothing of any value was given up therefor.

Judgment will be reversed as to the value of the horses, and as to the carriage affirmed.

BRETT and COTTON, L. J. J., delivered separate concurring judgments.

A WITNESS of the lowest class and type entered the witness box of an English court room, and was duly sworn. His testimony was very important in the case. To the first question he replied that he would not answer anything till his expenses were paid. He denied everything, and could remember nothing. "Proceed with your examination," said the judge, addressing the counsel; "if he refuses to answer, he shall be committed for contempt; if he willfully misleads, he shall be indicted for perjury." There was no further trouble with the witness.

FIRES CAUSED BY LOCOMOTIVES—NEGLIGENCE — PROXIMATE AND REMOTE CAUSE.

SMALL V. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD.

Supreme Court of Iowa, April 2, 1878.

HON. JAMES H. ROTHROCK, Chief Justice.
" WM. H. SEEVERS,
" JAMES G. DAY,
" JOSEPH M. BECK,
" AUSTIN ADAMS, } Associate Justices.

1. FIRES CAUSED BY LOCOMOTIVES— ABSOLUTE LIABILITY OF COMPANY.—Under section 1289 of the Iowa Code, a railroad company is absolutely liable for all damages by fire set out or caused by operating its road, without regard to the question of negligence.

2. PROXIMATE AND REMOTE CAUSE.—In an action to recover for the loss of an elevator which was burned by fire caused by the locomotive of the defendant communicating sparks to another elevator near its track, from whence the fire spread to the plaintiff's building: *Held*, that the fire from the defendant's locomotive was the proximate cause of the loss, and that it was liable for the damage.

3. THE STATUTE UNDER WHICH THE ACTION in this case was brought is constitutional, and is not void for want of constitutional enactment by the General Assembly, under art. 3, p. 2, § 1 of the state constitution.

4. JUROR—CHALLENGE.—A juror was challenged for cause, and the objection overruled by the court. He was then challenged peremptorily, and the jury accepted without the defendant having exhausted his peremptory challenges. *Held*, no ground for reversal.

APPEAL from Poweshiek Circuit Court:

Action at law to recover the value of an elevator and certain personal property therein burned by a fire, set out, as it is alleged, by an engine operated upon the defendant's railroad. The fire was not communicated to the elevator in question from defendant's engine, but by another burning elevator seventy feet distant, and within twenty feet of the railroad track, which was set on fire by sparks communicated by the engine. There was a verdict and judgment for plaintiff. Defendant appeals.

Wright, Gatch & Wright, for appellant; *Fairall, Bonordon & Ranck*, for appellee.

BECK, J., delivered the opinion of the court:

The several questions arising upon this appeal will be considered in the order of their discussion presented in the brief of defendant's counsel:

A challenge to a juror made by defendant on the ground of an opinion upon the merits of the case, formed and entertained, was overruled. Subsequently, the defendant challenged the juror peremptorily and accepted the jury without having exhausted its peremptory challenges. The overruling of defendant's challenge is the ground of the first alleged error brought to our attention. It may be conceded that the juror upon his *voir dire* disclosed the existence of an opinion entertained by him, disqualifying him to sit in the case. But by reason of the subsequent exclusion of the juror upon the peremptory challenge of defendant,

no prejudice resulted in the trial of the cause. As defendant did not exhaust its peremptory challenges, it was not prejudiced by being required to direct a challenge of that character to the juror. The jury must be regarded as having been selected by defendant, without objecting to any one finally sworn upon the panel. The law can secure to him nothing more. State v. Elliott, 45 Iowa.

The action is brought under Code § 1289, which is in these words: "Any corporation operating a railway, that fails to fence the same against live stock running at large, at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence, for the value of the property or the damage caused, unless the same was caused by the willful act of the owner or his agent. And, in order to recover, it shall only be necessary for the owner to prove the injury or destruction of the property; and if such corporation neglects to pay the value of, or damage done to any such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served upon the officer, station or ticket agent employed in the management of the business of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed or damages caused thereto: *Provided* * * * the operating of trains, upon depot grounds necessarily used by the company and public, where no such fence is built, at a greater rate of speed than eight miles per hour, shall be deemed negligence and render the company liable under this section. *And provided further*, that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating any such railway, and such damage may be recovered by the party damaged, in the same manner as set forth in this section in regard to stock, except double damages."

The court gave to the jury an instruction in the following language:

"2nd. It is provided by statute, in this state, that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway. And the question arises in this case whether the defendant is liable unless it be shown that the fire was caused by the negligence of the defendant or its employees, or whether the liablity is an absolute one, regardless of the question of negligence. It is my opinion, and I instruct you that under this statute, if it be shown by the evidence that the fire was caused by the defendant in operating its railway, it is absolutely liable for the damages caused thereby, whether the defendant was or was not guilty of negligence." An instruction to the effect that plaintiff is not entitled to recover unless it be shown that the fire was set out through defendant's negligence was asked by defendant and refused. The giving of the one and the refusal of the other instruction is now complained of by defendant.

Counsel for defendant insist that, in a case of this character, no recovery can be had except upon proof of negligence on the part of defendant. They base this position upon the argument that, under the section quoted, a railroad company is liable for the destruction of stock because of its negligence in failing to fence its track; that the absence of a fence, *per se*, constitutes negligence, and, therefore, in the case of fire there can be no recovery against the corporation unless some act of negligence is proved, or may be inferred. Negligence, they insist, under the first proviso of the act, is the ground of recovery. They conclude, therefore, that, as the cases contemplated in the parts of the section relating to the destruction of live stock, depend upon negligence, those contemplated in the last proviso must be based upon the same ingredient, for damages in the last named cases are recoverable by the very language of the section, in the same manner as in the first.

There are two answers to this argument, the first, admitting its premise to be true, namely, that the existence of negligence is a necessary ingredient of a cause of action for the recovery for stock injured upon the road of the corporation. The argument assumes that negligence for killing stock at points where the corporation has a right to fence, other than depot grounds, consists in the failure to fence. The absence of a fence permits cattle to go upon the road; the negligence is in such permission. It will be observed that the negligence consists in permitting that which the railroad company could not prevent. The negligence at the depot ground, in the same manner, consists in permitting the rate of speed which the company could prevent. The same character of negligence is found in the act of permitting fire to escape. The corporation could prevent it; injury results in its escape. The law, therefore, holds it to be negligence.

But it may be said that the fire might escape through accident. True, but this does not excuse the company any more than the running of the train through oversight, mistake or accident at a greater rate than eight miles an hour would excuse the killing of cattle on the depot grounds, or the failure to build a fence through accident, as the accidental burning of the lumber before the fence was erected, or the like, would excuse the want of a fence. The negligence in each of the three classes of cases contemplated by the statute consists of acts of permission; the permission of stock to run on the track, whereby it is destroyed; the permission of a prohibited speed, whereby animals are injured; the permission of fire to escape, whereby property is consumed. The acts are of the same character. But it may be said as fire must be used in running an engine, the railroad company can not dispense with it, and whenever used it is liable to escape through accident, and can not be certainly controlled. But this conclusion we can not admit. We are of the opinion that contrivances may be applied to engines that would prove just as effectual in preventing the escape of fire as a fence is in preventing cattle going upon a railroad track. Whether such contrivances are in use we know not, and it

is not important to enquire; that they may be applied can not be doubted when we contemplate the resources which science brings to the aid of machinists. At all events the law, in holding railroad companies liable for damage resulting from fires set out by their engines, presumes they may prevent injuries resulting in that way.

But the more satisfactory answer to the argument under consideration is by the denial of the premise upon which it is based, viz: the right of action for stock injured depends upon the negligence of the railroad corporations. The law does not require fences to be built, and does not prohibit a rate of speed greater than eight miles an hour upon depot grounds. It simply creates a liability for cattle injured where no fences are erected and the speed is beyond that named. There is no violation of law in failure to erect fences, or in running at a greater speed than is named; the rights of no one are involved thereby, and the companies exercise an undoubted right in refusing to fence, or in running their trains at a speed exceeding eight miles an hour. Surely, when an act is done which the law does not forbid, which is in conflict with the rights of no one, and is done in the exercise of a right, it can not be said to be negligence. This court has held that the liability of a railroad corporation for stock killed,at a place where the right to fence existed, and the road was not fenced, exists without regard to the question of negligence. Spence v. C. & N. W. R. Co. 25 Iowa 139; Stewart v. B. & M. R. R. Co.. 32 Id. 561.

Let us notice carefully the language of the statute, and consider the liability created and the remedy provided: 1. As to the liability: A railroad corporation is liable for stock killed at points upon its road where the right to fence exists and no fence is erected. The liability exists in specified cases; these are where no fence has been built, and the right to fence exists. The law applies to no other. 2. As to the remedy: In order to recover it shall only be necessary for the owner to prove the injury or destruction of his property. Negligence need not be shown.

In the cases contemplated by the statute as above specified, and in no other, the remedy is applied. Now it is very plain that the conditions of fences, and the right to fence, have no reference to care or negligence; they are introduced solely as conditions upon which the cases rest. Where these conditions are filled, liability of the railroad company attaches.

The last clause of the section cited imposes liability upon railroad companies for damages resulting from fire caused by the operating of their roads. There is no condition accompanying the act of setting out fire necessary in order to create liability. It is absolute, without conditions, and depends upon no fact or circumstances other than the fire. No idea of negligence enters into the clause. It is provided that damages may be recovered in the same manner as provided for recovery in the cases of stock killed. The provision does not relate to the liability, but to the remedy. Whatever pertains to the remedy in the preceding part of the section is here referred to, and nothing else. It will, therefore, be readily seen that no idea of negligence enters into the provision creating liability on acccount of fire. No such idea is in the preceding part of the section, and the reference to the context in the clause under consideration of course can convey no thought of negligence.

But even if the conditions of fences and the right to fence, in that part of the section creating liability for stock killed, convey the idea of negligence (which we have demonstrated not to be so), the thought of negligence can not be found in the last clause creating liability for fire, for the plain reason that there are no conditions whatever upon which such liability is made to depend. It is absolute, without conditions. The language referring to the manner of recovery, as we have seen, expresses no condition attached to the liability, but relates to the remedy.

Counsel for defendant cite De France v. Spencer. 2 G. Greene, 462, which holds that a statute making a party liable in a civil action for injuries sustained from fire set out by him and permitted to escape, can not be enforced against him, unless he willingly or carelessly permitted the escape of the fire. It is insisted that the doctrine of this decision is applicable to the case before us. The statute differs from the one before us in the particular, that it is penal, subjecting the party to a fine upon information, and upon conviction in the criminal proceeding his liability to the party injured accrued. As he could not be convicted unless the act was knowingly and intentionally committed, his civil liability would arise only upon the same conditions. Upon this view the opinion, so far as it holds that the act must be *willingly* or carelessly done, may be supported. But a similar statute was by this court held to impose liability without regard to negligence, under a legislative intention discovered by comparing the statute with another in *pari materia*. Com. v. May, 36 Iowa, 241. We need not inquire whether these cases are in conflict. We think that as they construe penal statutes, they are not applicable to the case before us, which involves the construction of a statute intended to secure a civil right and its enforcement by action.

It is insisted that a fire might be set out from an engine of a railroad company by inevitable accident or the act of God. In such a case, it is claimed, a corporation would not be liable. It is neither necessary nor proper to enter into inquiries suggested by this position. No such a question is presented in the record, either by the pleading or evidence before us. It is not claimed, even in argument, that the fire was set out by inevitable accident. No such question was raised by request for instructions, and had an instruction been requested presenting this view of the law, it would have been properly refused as being inapplicable to the testimony. The instruction given by the court as above quoted is not erroneous, even should it be held that inevitable accident would relieve the defendant of liability, for no

such defense was raised and no evidence in support of that theory was before the court.

The fire was not communicated to the property destroyed, for which this action is brought, directly by defendant's engine; it was communicated to another elevator and thence to plaintiff's property. It is insisted that the injury suffered by plaintiff is the remote and consequential effect of the defendant's act, and no recovery can be had therefor. The rule that damages must be the direct and proximate result of the act complained of, and not the remote and consequential effects, is not the subject of dispute in the profession. But the application of the rule is the subject of constant disagreement in the authorities. Cases similar in facts with the one before us have been decided differently by the courts. It is impossible to reconcile the books upon this point, and arguments based upon reason could hardly be presented that would meet with general approbation. In our opinion, the injury sustained by the plaintiff is within the limits of proximate and direct results of the act of defendant, for which he may recover. Milwaukee & St. Paul R. Co. v. Kellogg, 4 Otto, 5 Cent. L. J. 305; Fent v. T. P. & W. Ry. Co., 59 Ill. 349; Kellogg v. The C. & N. W. R. Co., 26 Wis. 223; Perley v. Eastern R. Co., 98 Mass. 414. See Field on Damages, §§ 50, 664 and notes, for collection of authorities upon this point.

The defendant's counsel next maintain that the statute under which plaintiff's action is brought is unconstitutional. The question thus raised was carefully considered by this court, and the statute was sustained in a unanimous opinion in Rodemacher v. The Milwaukee & St. Paul R. Co., 41 Iowa, 297. The arguments upon which that decision is based are quite satisfactory, and need not be repeated.

An argument against the law is based upon the possible consequences that might result in the case of a fire communicated by a railroad engine consuming such great amount of property, that the company by the enforcement of the law would lose all its property. The statute, it is said, would thus be the means of the destruction of the corporation, under a power to be exercised only for its regulation. It would, therefore, it is claimed, destroy vested rights. The argument is based upon a case of supposed hardship. We may admit the possibility that such a case may; but it is no ground for holding the act void. The courts would fail utterly in the administration of justice if they were to enforce only such rules as in no conceivable case will work hardship. In truth, hardships in the administration of the law are constantly occurring. "Hard cases make bad law," is a familiar legal proverb. But "hard cases" never "make bad law," except where judges modify fixed and established rules to suit the cases, or adopt new rules intended to mitigate their hardships. It is bad enough for "bad law" to be made for real "hard cases;" it would be much worse for judges to anticipate possible hard cases and suit their rulings thereto, rather than adapt them to the rights and obligations of the parties in the cases before the courts.

The question to be determined in passing upon the validity of this statute is this: Is it within the scope of the constitutional powers of the state? If so, the power assumed by the law may be exercised without regard to future consequences, even though they might be what counsel call the destruction of the property of a railroad corporation. The state has the authority to levy taxes for the protection of the rights of the people and its own existence. It may, if necessary, be exercised to the extent of condemning and appropriating by taxation all the property in the state. Shall we hesitate to enforce the power to tax on the ground of the disastrous consequences of the exercise of the power to its full extent, which, possibly, at some future day, may be felt by the people? The argument of counsel, in our opinion, is not based upon proper views of the powers of the state, and of the necessity of individuals and corporations submitting their property to the operation of laws intended for the public good, even though cases may possibly arise whereby, under the law, they would be deprived of their property.

It is lastly urged that the section of the code under which this action is brought is void, for want of constitutional enactment by the General Assembly. We will proceed to the consideration of this objection.

The constitution of the state, art. 3, p. 2. § 1, provides that the style of every statute shall be: "Be it enacted by the General Assembly of the state of Iowa." Art. 3, p. 2, § 29, is in these words: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Section 1289, under which this action was prosecuted, is a part of Title X of the Code. This title was passed by the General Assembly as a separate act in adopting the Code. The same is true of each separate title—each was a distinct act. The title of this act—Title X of the Code — as it appears upon the rolls, is this: "Title X. Of internal improvements. A bill for an act to revise, amend and codify the statutes in relation to internal improvements." The style of the act is as required by the constitution: "Be it enacted by the General Assembly of the state of Iowa." This title and style of acts are not printed in the collection of statutes called the "Code." It is insisted by defendant's counsel that the acts designated as Title X of the Code, violate the provision of the constitution above quoted, requiring each act to embrace but one subject and matters properly connected with it, to be expressed in the title. The history of the code and the legislation therein found is familiar, but to present more clearly our views we must briefly state it here.

The thirteenth General Assembly enacted a statute appointing commissioners to revise and codify existing statutes and recommend amendments thereto for the consideration of the succeeding General Assembly. Their report, in the

form of distinct acts, was the foundation of the code, being enacted after various changes and amendments introduced while it was pending before the legislature. In Title X, the various statutes upon the subject of railroads are revised and codified and amendments added thereto, either upon the recommendation of the commissioners, or upon action first had in the General Assembly. Among these amendments is the provision of section 1289, under which this section is prosecuted.

It is now argued by counsel for defendant that there are two subjects expressed in the title of the act in question—Title X, viz: 1. Revision and codification of the statutes in this branch of the law. 2. Amendments relating to the substance of the statutes constituting original provisions.

The object of the revision and codification of the statutes, as accomplished by the code, was the enactment of *new statutes* to supersede those before in force. We do not mean new provisions, necessarily different from those of former enactments, but new enactments, to take the place of existing statutes. The new statutes were either the same in substance and different in form and arrangement, or were changed, amended, and thus introduced in the code. To carry out this plan of codification all existing statutes, the subjects whereof are reviewed in this code, were repealed. Code, sec. 47. We thus have a new statute—Title X of the code—taking the place of existing enactments. The object of this statute was to present provisions on the subject of legislation therein contemplated which, while they were the same, or similar to, prior provisions, or were amendments thereto, or were new provisions, are presented in a new statute. The subject of this statute is internal improvements, which is plainly and directly expressed in the title. It is the leading, principal subject, and is so expressed by the very first words of the title of the act, viz: "*Of internal improvements.*" The constitution declares that an act shall embrace but *one subject, and the matters properly connected therewith.* The matters properly connected with this subject need not be just here a subject of inquiry.

Counsel insist that the subject of the act is expressed in the words found in the title: "A bill for an act to revise, amend and codify the statutes in relation to internal improvements." It may be admitted that these words are a part of the title; they are not all of it. The other words, "of internal improvements," are not to be disregarded. The title of the act expresses these thoughts: "A statute treating of internal improvements, being a bill for an act revising, amending and codifying the statutes upon that subject." The subject is internal improvements; the other parts of the title are explanatory as to the origin and history of the statute. The title not only expresses the subject, but goes further. The words which express matter besides the subject, counsel rely upon as expressing the subject of the act. Herein is their error.

But, if we are in error in holding that the revision, amendment and codification of statutes are of the subject of the act, it can not be claimed that they constitute the whole subject, or the main and leading subject. They can be no more than subjects, matters connected with *the* subject of the act.

The subject of the act is, as we have seen, "Internal improvements." Railroads are termed internal improvements in the statutes of this state. See Revision 1860, Title XI; Code 1851, chap. 46. Provisions in regard to the construction of railroads may be said to have for their subject internal improvements. These roads are built, owned, and operated by corporations, clothed with certain rights, and charged with certain duties and liabilities under the statutes; these corporations, and their rights and liabilities, pertain to the building, ownership and operation of railroads. They are matters properly connected with *internal improvements*, and under the constitution, art. 3, p. 2, § 29, may be provided for in statutes upon the subject of railroad internal improvements.

But it is said there are a variety of matters in Title X of the code besides those pertaining to railroads, as provisions in regard to mill-dams, drains, ditches and water courses, telegraphs and the like. It is not necessary for us to inquire whether these matters relate to internal improvements; for if they do not this fact, under the section of the constitution just cited, will not defeat legislation which is upon the subject of the act.

The foregoing discussion disposes of all questions raised in this case. We are of the opinion that no error appears in the record.

Affirmed.

SEEVERS, J., dissenting:

An important question determined in the foregoing opinion is, what is the proper construction of the last proviso in § 1289 of the code. From the conclusion reached I feel compelled to dissent. The question is not whether an absolute liability may be created, but whether it has been done. The constitutionality of the statute will be assumed. In order to arrive at a satisfactory conclusion, that portion of the section preceding the last proviso should be examined.

Where a railway company has the right to fence and does not do so, its liability for stock killed or injured is absolute, and does not depend in any respect on negligence in fact. The liability is based on the failure to fence. Such failure is statutory negligence. In other words, the right to recover is made to depend on the failure to do that which the company has the right and power to do.

I will assume that all the plaintiff has to prove in order to recover for stock injured or killed is the "injury or destruction," and that the burden is on the corporation to prove the road was fenced or that the right to do so did not exist. To my knowledge it never has been claimed that an absolute liability was created by the statute independent of the right to fence. The existence of such right, therefore, as well as the sufficiency of the fence, may arise on the trial of any case, and these, under proper instructions, would be questions for the jury. The right to recover, therefore, is dependent on the mere construction or insufficiency of the fence. The statute creating a liability for a

failure to fence existed previous to the adoption of the code; the last proviso of § 1289 being added to the previous law at that time. Previous to this it had been held that, before there could be a recovery for damages caused by a fire set out by an engine on a railway, plaintiff must prove negligence, the onus or burden being on him to establish such fact. Gandy v. C. & N. W. R. Co., 30 Iowa 420.

Such being the statute and laws as declared by the court, the following was added to the statute: "And provided, further, that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating such railway, and such damages may be recovered by any party damaged in the same manner set forth in this section in regard to stock, except double damages."

This statute abrogated the rule recognized in the case above cited. In the absence of positive and controlling words indicating a different intent, I incline to think the presumption is that such was all that was intended. This presumption becomes stronger when the result is reached that an absolute liability has been created, which in no wise depends on the care, negligence, motive or intent of a party. A statute should never be so construed unless at least there is no escape from the conclusion that such was the legislative intent. It is not, however, necessary to rest entirely on such presumption. The statute is that a recovery may be had in the *same manner* as provided where stock is injured or killed. In the absence of the statute it is believed the established rule is that no recovery could be had for stock killed, unless negligence was shown, whether the road was fenced or not. If not fenced, all the plaintiff has to prove in order to recover under the statute, if a liberal construction in his favor is adopted, "is the injury or destruction of his property." But certainly the defendant could escape a recovery by showing a right to fence did not exist.

So here, all the plaintiff has to prove in order to recover is that the "fire was set out or caused by the operation of the railway," and the amount of his damages. The fact that the fire was so "set out or caused" is statutory negligence. The burden is then cast on the defendant in order to escape a recovery to show inevitable accident, which human foresight, prudence and care could not guard against.

A recovery in the "same manner" does not in this construction mean the same form of action or proceeding. It means by the same measure of proof. This court has held that the liability for killing stock in the absence of negligence, does not attach at places where the company has the abstract legal right to fence, but only at such places as "it is fit, proper and suitable that the fence should be built." Davis v. B. & M. R. R. Co., 26 Iowa 549. It has also been held that where a fence has once been erected, the company is only liable for ordinary diligence in keeping it in repair. Aglesworth v. C. R. I. & P. R. R., 30 Iowa 459; Perry v. D. S. W. R. Co., 36 Id. 102; McConnell v. C. R. I. & P. R. Co., 41 Id. 195.

By the rule of these cases, if a fence once built is destroyed by flood, storm, or fire, no liability attaches until the company has had notice of the destruction of the fence and a reasonable time to rebuild it. I cite the foregoing cases as showing that this court has never held the absence of a fence, where there was a strict legal right to fence under all circumstances, created a liability against the company for stock killed.

On the contrary, it has been repeatedly held that under certain circumstances the company is not absolutely liable for stock killed at points where the company had the right to fence and no fence inclosed the track at the time of the loss. If, therefore, the plaintiff in this case may recover in the same manner, or by the same measure of proof, as in the action for killing stock, it was error to instruct that if the fire was caused by operating the road, the defendant was absolutely liable.

If the statute provided: "Any corporation operating a railway shall be liable for all damages by fire set out, or caused by operating of such railway," it might be well claimed an absolute liability had been created thereby. But the statute proceeds to define the manner of the recovery, and the only thing peculiar therein is a definition of the proof required on the part of the *plaintiff*. The amount and quality of the proof on *his* part is defined. Where this has been adduced, a recovery follows, of course, unless the *defendant* can show, in accordance with recognized principles of law, facts which will prevent such recovery. The statute *does not undertake to define what the defendant must show to overcome the statutory proof*, but leaves it to be determined by the principles of the common law, as declared to exist by the courts of this country. The practical effect of the majority opinion is, that it matters not what the defendant may show, a recovery must follow the introduction of the statutory proof. For, to my mind, it is clear the instruction copied in the opinion recognizes the principle that the defendant is absolutely liable, and that by no possible care and diligence on its part could such liability have been averted

It is assumed without warrant, I think, in the opinion, that there are contrivances that may be applied to an engine which will prevent the escape of fire. There is nothing in the record before the court so showing, and I feel reasonably sure that the court can not judicially know there are any such. Nor is it safe to say any such will ever be discovered. If there should be, it is difficult to see how the liability of the defendant should be in any wise measured thereby.

The effect of my views would be to reverse the ruling below, but in view of the position taken in the foregoing opinion as to the pleadings, proof and instructions, including the agreement of counsel at the oral argument, it would require considerable space to demonstrate this fact, and that already occupied admonishes me this should not be done. In any event, I should be unwilling to permit the opinion as to the construction of the statute to be filed without dissenting therefrom.

ROTHROCK, C. J., concurs with me.

DIGEST OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

October Term, 1877.

FIRE INSURANCE—CONTRADICTORY PROVISIONS—CONSTRUCTION.—1. Where a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company can not justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself. 2. It appears from the special finding that, by the terms of the application, the assured was required to state separately "the estimated value of personal property and of each building to be insured, and the sum to be insured on each; * * * the value of the property being estimated by the applicant." The applicant was also directed to answer certain questions and sign the same, "as a description of the premises on which the insurance will be predicated." Among the questions to be answered were: "What is the cash value of the buildings, aside from hand and water power? What is the cash value of the machinery?" The answer was: "$15,000, building; $15,000, machinery." The application concludes with these words: "And the said applicant hereby covenants and agrees to and with said company that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk." The policy refers to the application in these words: "Special reference being had to assured's application and survey, No. 1462, on file, which is his warranty, and a part hereof." The policy further recites: "If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy, and a warranty by the assured; and if the assured, in a written or verbal application, makes any erroneous representation, or omits to make known any fact material to the risk, * * * then, and in any such case, this policy shall be void. * * * Any fraud or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy." * * * The policy also declares that it is made and accepted upon the above, among other, express conditions. It was found by the court that when the policy issued, as well as at the date of the destruction of the property by fire, the cash value of the building, aside from hand and water power, was $8,000 and no more; and the cash value of the machinery, at the same dates, was $12,000, and no more. But the court also found that "the answers made by the assured to the questions contained in the application were made by him in good faith, without any intention on his part to commit any fraud on the defendant." It was further declared in the special finding that "under the provisions of the policy and application, made part hereof, the court finds, as a conclusion of law, that the answers of the assured as to the value of the property insured defeat the right to recover on the policy." *Held* erroneous, as it does nor clearly appear that the parties intended the validity of the contract of insurance to depend upon the absolute correctness of the estimates of value, and as it does appear that such estimates were made by the assured without any intention to defraud. The plaintiff is entitled to a judgment, notwithstanding the over-valuation of the property. *First Nat. Bank of Kansas City v. Hartford Fire Ins. Co.* In error to the Circuit Court of the United States for the Western District of Missouri. Opinion by Mr. Justice HARLAN. Judgment reversed.

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Associate Justices.

PARTNERSHIP. — Where a landlord agreed with another that the other should farm his land, and that they should each defray half of the expenses and take half the profits, the agreement does not, as a matter of law, constitute them partners. 1 Camp 329, 6 Ver. 119; 1 Hill's Rep. 30 Maine; 15 Wend. 379; 6 Metc.; 53 Mo. 504. Opinion by NAPTON, J. — *Donnel v. White Admrs.*

AWARD OF ARBITRATORS.—The law favors awards made by arbitrators, and they can not be set aside except for cause. Where after protracted examination, argument of counsel, and the filing of briefs by both sides containing references to the pages of books of accounts which were confusedly kept, it was error to set aside an award because the arbitrators called on one of the attorneys in the absence of the other to find the pages referred to by him in his brief, and point out the items of account commented on by the attorneys in their arguments. Opinion by NAPTON, J.—*Neely v. Buford.*

LICENSE — LEASE — PRACTICE.—A license merely makes an action lawful which would otherwise be unlawful, but passes no title or interest: but a license by writing obligatory, giving an interest in the property to which it refers is an incorporeal hereditament, and is irrevocable except for breaches of the conditions stipulated; as e. g. a license to enter and mine, which is not a lease, because there is nothing in it inconsistent with continuance of the grantor's possession of the land. Vaugh. 351; 7 Scott, 855; Bainbridge on Mines and Mining, Ch. 8, §54, p. 255; Cruise's Dig., C. 5, vol. 4; 28 Mo. 199; 2 B. & A. 736; 8 Mod. 11, 318; 6 T. R. 458; Rawle on Cov. Ch. 6. Where notice is given to produce a paper and the paper is sufficiently identified by the description to imform the holder precisely what paper is referred to, it must be produced, although called by a wrong name, e. g. a lease instead of a deed, or *vice versa*. Opinion by NAPTON, J.—*Boone v. Gramby M. & S. Co. et al.*

EJECTMENT — EQUITY.—The defendant went into possession in 1864 under a sheriff's deed, issued on a valid judgment, but of no validity itself because the levy was made after the return day of the writ against Long. The plaintiff, a receiver of Long in 1870, began an attachment against this land, and perfected his suit by sheriff's deed in June, 1872. In 1871 the defendant procured a quit-claim deed from the heirs of Bird, who had held the legal title all the time, in order to protect his possession acquired in 1864, which he had the right to do (Freeman's Ch. R. 123). The plaintiff adopts the sale and conveyance in order to avoid the necessity of making Bird's heirs parties, and insists that defendant having required this legal title shall transfer it, without compensation for the purchase money paid by him or for taxes paid. Now Long could not have done this; can his creditors in 1870 do

so? I am not satisfied to answer in the affirmative, but as the other judges hold that the equity of the defendant does not reach Long's creditor, the judgment for the plaintiff must be affirmed. Opinion by NAPTON, J.—*Davidson v. Robinson.*

EQUITY—BILL TO REFORM MISTAKE.—Bill avers that plaintiff, a partner in the firm of J. C. & Co., sold and intended to transfer by written agreement to the firm his interest (being ¼) in the "good will and prospective profits" of the partnership, and that by mistake these words were omitted, so that the agreement reads as a transfer of his interest in the firm, including the *assets* thereof; and that a suit at law has been instituted on the agreement. Prayer for reformation of the contract, and injunction on proceedings at law. Answer denies the bill, and both pleadings are sworn to. *Held*, that the facts averred being clearly proved, the written agreement does not express the intention of either contracting party, and constitutes a mistake of fact upon which a court of equity may grant relief. But this plaintiff having sold the "place and influence" he had in the old firm, and having very shortly afterwards opened a new business of the same kind only a few doors from the place of the other firm, in consequence of which that firm was dissolved, (one of its members being a brother of defendant's) the injunction will only be granted on condition that the plaintiff who seeks equity here will do equity, that is, refund to the other parties the purchase money paid by them, so as to place them as nearly as possible *in statu quo*. Opinion by NAPTON, J.—*Cassidy v. Metcalfe.*

ABSTRACT OF DECISIONS OF THE ST. LOUIS COURT OF APPEALS.

[Filed March 26 and April 2, 1878.]

HON. EDWARD A. LEWIS, Presiding Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

PRESENTMENT OF CHECK—CUSTOM.—Where a check was duly presented at the counter of the drawee, and payment demanded and refused, the fact that, if it had also been presented at the clearing-house, it would have been paid, and there was a mercantile usage of presenting such checks, when deposited in bank, at the clearing-house for payment, and that this check was deposited in plaintiff's bank, but not presented at the clearing-house, will not discharge the drawer of the check, if otherwise liable. 2. Though custom should make a presentation to the drawee's agent at the clearing-house, the equivalent of a presentation at the counter of the drawee, it would not become necessary to present the check at the clearing-house, after it had been duly presented and refused at the bank. Affirmed. Opinion by LEWIS, P. J.—*Kleekamp v. Meyer.*

STATUTES REGULATING PROSTITUTION—KEEPING BAWDY-HOUSE.—Sections 19 and 20 Wagner's Statutes, 502, were designed for the suppression of prostitution, not for its regulation. The city charter of 1870 repealed them both as to St. Louis; and, when the charter provision was repealed by act of 30th March, 1874, the original provisions for suppressing prostitution were not revived. There is no statute in existence under which the renting of a house for a bawdy-house in St. Louis can be punished as a criminal offence. 2. But the keeping of a bawdy-house is a common law offence, and an indictment for keeping a bawdy-house will be sustained by proof that one has rented a house to another for the purposes of prostitution. The one who leases a house for a bawdy-house must be charged as a principal in keeping the house. All who abet a misdemeanor are principals. Affirmed. Opinion by LEWIS, P. J.—*State v. Lewis.*

RAILWAY NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.—1. It is for the jury to make all reasonable inferences; and where there is evidence to support the verdict, the appellate court will not weigh conflicting testimony. 2. Though it be unlawful for those not connected with a railroad to walk upon its track, and it is presumed that every one will obey the law, it does not follow that a railroad company may run its cars through the streets of a city without keeping a careful lookout. 3. In case of a railroad accident, the negligence of plaintiff may be wholly immaterial. The essential question in such a case is what was the immediate cause of the final act. Where the negligence of plaintiff was a remote condition, and that of defendant was the *causa causans*, the negligence of plaintiff is no bar to recovery. 4. What is ordinary prudence depends, not on abstract propositions, but upon the facts of each case. A railroad company is bound to use ordinary prudence to avoid injury, even to trespassers. 5. Where a child of two years old was walking on the track of a railroad as the train backed towards it, and there was evidence tending to show that no one on the train saw the child till after the accident, and that, if some one on the train had been on the look-out, the accident might have been avoided, the company is liable in damages for running over the child. Affirmed. Opinion by HAYDEN, J.—*Frick v. St. L., K. C. & N. R. R.*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877—*Filed March* 27, 1878.

HON. W. W. JOHNSON, Chief Justice.
" JOSIAH SCOTT, }
" D. T. WRIGHT, } Associate Justices.
" LUTHER DAY, }
" T. Q. ASHBURN, }

HOMESTEAD SALE—SURPLUS—ABANDONMENT.—1. By the act of 1850 (2 S. & C. 1145), the homestead having been sold under a claim which precludes the allowance of exemption, leaving a surplus, the debtor may insist upon his allowance out of such surplus, as against creditors whose claims do not preclude the allowance of a homestead. 2. If the debtor has voluntarily abandoned his homestead before claiming it as exempt, his right is gone; but the court having found there has been no such abandonment, that finding can not be reviewed upon error, the bill of exceptions not showing the evidence upon which the court based its action. Judgment affirmed. Opinion by WRIGHT, J.—*Jackson v. Reid.*

NEGLIGENCE—CROSSING STREET—PRACTICE ON APPEAL.—1. A person about to cross a street of a city in which there is an ordinance against fast driving, has a right to presume, in the absence of knowledge to the contrary, that others will respect and conform to such ordinance; and it is not negligence on his part to act on the presumption that he is not exposed to a danger, which can only arise through a disregard of the ordinance by other persons. 2. But where he knows that others are driving along the street, at the place of crossing, at a forbidden rate of speed, and he has full means of seeing the rate at which they are driving, the existence of such ordinance will not authorize a presumption which is negatived by the evidence of his senses. If the attempt to cross the street, under the circumstances, would be negligence on his part, the fact of the existence of such city ordinance is not evidence tending to free him from culpability. 3. Where the overruling of a motion for a new trial is assigned for error, and all the evidence offered on the trial, together with the charge of the court, is properly brought up by bill of exceptions, a reviewing court will, in connection with the evidence, look to the charge

of the court, whether excepted to or not; and if there is reason to believe that the verdict was the result of erroneous instructions, will reverse the judgment and award a new trial. Opinion by SCOTT, J.—*Baker v. Pendergast.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1877.

HON. HORACE P. BIDDLE, Chief Justice.
" WILLIAM E. NIBLACK, }
" JAMES L. WORDEN, }
" GEORGE V. HOWK, } Associate Justices.
" SAMUEL E. PERKINS, }

EASEMENT—ACTION TO QUIET TITLE.—An action will lie to quiet one's right or title to land against one claiming an easement therein. An easement runs with the estate and is a hereditament, and is included in the phrase "real property." Opinion by WORDEN, J.—*Davidson v. McNicholson.*

WHEN HEIRS OF A DECEDENT MAY SUE FOR DEBTS.—As a general rule, the right to sue for a debt owing to a decedent at the time of his death vests in his executor or administrator; but where a party dies intestate, leaving no debts to be paid, and no administration is had upon his estate, his heirs may sue for the recovery of any debts due the estate. 54 Ind. 524. Opinion by HOWK, J.—*Moore et al. v. Board of Commrs. of Monroe Co.*

DECEDENT'S ESTATE—CONTRACT FOR SERVICES.—A agreed with B to nurse him and his family through and attack of disease then prevailing in B's family. *Held*, the contract meant that A should perform the services till the family should be well, though B or any other member might die in the meantime. The contract was not discharged or terminated by the death of B, and the claims for services so rendered after his death could be collected from his estate. Opinion by WORDEN, J.—*Toland, Adm'r. v. Stevenson.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

August Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

PROMISSORY NOTE — MATERIAL ALTERATION — PLEADING — AMENDMENT.—1. An alteration of a promissory note by the holder, changing it from a promise to pay "to the order of——," to a promise to pay "—— or bearer," would be material. 2. A promissory note altered by a trespasser, against the will of the holder, remains valid as originally written. 3. If such note is by mistake declared upon as altered, the complaint is amendable at the trial, to correspond with the proof, and must be considered as amended on appeal from a judgment for the holder. Opinion by RYAN, C. J.—*Union National Bank v. Roberts et al., imp.*

SERVING NOTICE BY MAIL.—1, Under Ch., 264 of 1860, which requires notice of appeal to be served on the clerk and the respondent within the time limited for appealing, such a notice mailed to the clerk or attorney residing in a different place on the evening of the last day for appealing, and not received until a subsequent day, is too late. 2. Sec. 39, Ch. 140, R. S., which declares that when service is made by mail as provided in the two preceding sections, "it shall be double the time required in case of personal service," appears to limit such services to notices of acts to be done in the future, and to exclude notices of acts done. Opinion by RYAN, C. J.—*Stevens v. Wheeler et al.*

PARTNERSHIP — INDIVIDUAL DEBT.—One partner without the consent, express or implied, of his copartners, can not apply a claim of the firm to the payment of his individual debt, even in order to retain for the firm its debtors' custom; and such attempted application, with knowledge of the facts by such debtor, will not defeat an action at law upon the claim by the firm or its assignee. Viles v. Bangs, 36 Wis. 131. Opinion by LYON, J.—*Cotzhausen v. Judd et al.*

CORRESPONDENCE.

"THOMPSON'S TENNESSEE CASES."

To the Editor of the Central Law Journal:

I have just learned through a private letter from a member of the bar of Tennessee that Mr. W. J. Gilbert, law publisher of this city, has just issued a small volume of cases called "Thompson's Unreported Cases," or "Thompson's Tennessee Cases," I am not certain which. As the publication of this book, if unexplained, is calculated to affect my reputation injuriously, I ask permission, through your columns, to make a short statement: In the year 1870, I undertook the editing of one or two volumes of decisions of the Supreme Court of Tennessee, which had been omitted by the authorized reporters. Most of the material at my disposal consisted of reports and notes of cases kindly placed in my hands by Hon. J. B. Heiskell, since and now the able Attorney-General and Reporter of Tennessee. Mr. Gilbert undertook to publish them for me, and some three hundred pages of the first volume were printed. But his printing office at that time was so poorly organized that, in addition to my own numerous faults of omission and commission, the typographical and mechanical errors beggared all description. No language can convey any adequate idea of the number and quality of these errors. They were such that Mr. Gilbert and myself mutually agreed that the work should not be issued in its then condition, and, in pursuance of that agreement, the sheets have lain suppressed for seven years. But lately, in violation of that agreement, and in opposition to a wish lately expressed by me in a letter to Mr. Gilbert, and in a surreptitious manner, he has bound up some of these sheets, with my name on the title page, and is selling them to the legal profession in Tennessee, leaving them to infer that the publication has been made with my approval. I wish to state distinctly that this publication is wholly disapproved by me; that, while I should have been glad to have these cases published, if printed in a decent manner, I can not refrain from thinking that their publication in the present shape is calculated, if unexplained, to inflict upon me a deep and undeserved disgrace.

SEYMOUR D. THOMPSON.

ST. LOUIS, April 11, 1878.

QUERIES AND ANSWERS.

[In response to many requests from lawyers in all parts of the country, we have decided to commence again the publication of questions of law sent to us by subscribers. We propose to make this essentially a subscriber's department—*i. e.*, we shall depend, to a large extent, upon them to edit this column. Queries will be numbered consecutively during the year, and correspondents are requested to bear this in mind when sending answers.]

QUERIES.

21. CHANGE OF VENUE FOR BIAS OF JUDGE—PROFESSIONAL ETIQUETTE.—H sues W on a contract for $1,400, and agrees to pay his attorneys all over a certain amount which he may recover in the action, for their services in conducting the suit. W makes affidavit to

the foregoing facts; also, swears that P, one of the attorneys for the plaintiff, is a brother of the presiding judge of the court in which the case is pending, and, as such attorney, is to receive a certain proportion of the amount recovered and he believes that he can not have a fair and impartial trial before Judge ——, the brother of P, and asks for a change of venue, under the following statute. "In all cases in which it shall be made to appear to the court that a fair and impartial trial can not be had in the county where the suit is pending, or where the judge is interested, or has been of counsel in the case or subject matter thereof, or is related to either of the parties, or *otherwise disqualified to sit*, the court may, on application of either of the parties, change the place of trial to some adjoining county wherein such impartial trial can be had; but if the objection be against all the counties of the district, then to the nearest county in the adjoining district." 1. Is the defendant, W, entitled to a change of venue, or of judges, to try the case under the foregoing statute. 2. Is a party, or his attorney, who asks for a change of the place of trial, as above stated, in good faith, guilty of a contempt of court, or breach of professional etiquette? Authorities are desired, if possible. N. M. & S.

[For a partial answer to this query see 6 Cent. L. J. 140.—ED. C. L. J.]

ANSWERS.

No. 15.

(6 Cent. L. J. 278.)

I would refer "Reader" to 3 Otto 72 for a possible answer to query No. 15. W. P. WARNER.

St. Paul, Minn.

The rule seems to be well settled, that where there is any defect in a chose in action, as between the original parties to it, an assignee, though receiving the same before due, and in good faith, can only recover the amount he actually paid for it. Todd v. Shelbourne, 8 Hun., (N. Y.) 510; Stevens v. Corn Exchange Bank, 3 Id. 147; Platt v. Beebe, 57 N. Y. 339; Jones v. Hibbert 2 Starkie 304; Allaire v. Hartshouse, 1 Zabriskie (N. J.) 665, and cases cited at p. 673; Stoddard v. Kimball, 6 Cush. (Mass.) 469; Hubbard v. Chapin, 2 Allen (Mass.) 328; Petty v. Hammer, 2 Hump. 102; Holman v. Hobson, 8 id. 127; Youngs v. Lee, 18 Barb. (N. Y.) 192, 193; affirmed, 2 Kernan, 551.

MERRITT KING.

Ithaca, N. Y.

No. 17.

(6 Cent. L. J., p. 279.)

See Wag. Sts., vol. 2., p. 823, c. 82, art. iv., §§ 20, 21. I do not know of any decision of the Supreme Court upon the point decided in Thomas' adm'r v. Dunnica, 15 Mo. 385, but do not think it is now the law. That case was decided in 1852, when the R. C. 1845 was in force, but the R. C. 1855 made important changes and additions (see R. C. 1855, pp. 153, 154, c. 2, art. iv., §§ 9, 10 and 11, and compare with R. C. 1845, c. 3, art. iv.), and seems by §10, art. iv., c. 2, *which is a new section*, construed with the other sections of same article, and other provisions regulating "Set Off," to change the law as announced in that decision. J. E. V.

"Can a judgment be rendered by a justice's court in favor of a defendant where an action is instituted by an administrator, for a debt due his intestate, and where, upon the trial, the facts show that the estate owes the defendant?" Yes, and said judgment would stand as an ordinary account against said estate—and would have to be filed against the estate—the judgment would not be of a higher nature than the account. Preferences given to judgments mean judgments rendered during life of deceased. SUBSCRIBER.

ESTRAYS.

THE proportioning of sentences to the guilt of the accused, which is allowed to the English judges to a very large extent, is discussed from different positions in the law journals. The *Solicitors Journal* concludes that the only mode of thoroughly reconciling the two conflicting views appears to be the adoption of the pious fraud which is stated some years ago to have been practised by a learned and tender-hearted judge who occasionally passed tremendous sentences on prisoners, *pour encourager les autres*, and then privately directed a less sentence to be recorded. The learned judge's brethren on the bench were understood to have protested against this practice, and it was discontinued.

A CORRESPONDENT in California writes: "The reference *ante* 241 to the disapproval, in a late case, of the rule in Thurtell v. Beaumont, 8 J. B. Moore, 612; 1 Bing. 339, reminds me of a rather singular rule recognized in two cases at *nisi prius*, that where a pleading in a civil case, which charges a party to an action with the commission of a felony, is found true by the verdict of a jury, the party may be arraigned and tried for the felony upon the verdict without an indictment. See Cook v. Field, 3 Esp. 133.; Prosser v. Rowe, 2 C. & P. 421. If this rule was generally recognized in the English courts at the time of the decision in Thurtell v. Beaumont, there were ample reasons for that decision which never could arise in this country."

IN a prosecution in England a few weeks ago, the jury returned a verdict of guilty, and recommended the prisoner to mercy. The Lord Chief Justice said: "Gentlemen, this is a recommendation I can not possibly listen to. The prisoner has committed a serious crime in circumstances of great aggravation, and there are no extenuating circumstances whatever to afford ground for such a recommendation." The trial having lasted all day, from the early part of the morning until a late hour in the evening, the jury desired to be discharged from further attendance. The Lord Chief Justice—"By all means, gentlemen. A jury who could hesitate so long in so clear a case and then recommend the prisoner to mercy without any ground whatever, must be a jury with whose services I should be most anxious to dispense, so I have the greatest pleasure in discharging you."

APROPOS of the American edition of Wharton's Legal Maxims, noticed 6 Cent. L. J. 257, and which has been so severely handled by the reviewers, a correspondent, who has been looking into the work, writes: "I find the maxim *respondeat superior*, upon pages 14, 185, 283 and 323. This is pretty well, for a maxim of two words. The maxim *certum est quod certum reddi potest* has more words, and so is entitled to occur oftener, Accordingly, we have it in the list on pages 9-14, on pages 47, 224 and 300, and as *id certumest*, etc., on pages 240 and 307, in all *six* times. That is to say, in four different lists, and in two instances reoccurring twice in the same list. So, besides being in the list on pages 9-14, the maxim *ex nudo pacto*, etc., occurs on pages 85, 234 and 304, four times. The maxim *omne majus*, etc., on pages 141, 270, 316, 343, and in a transposed form on page 309, five times. And the familiar maxim about the incident following the principal, on pages 219 and 345. I also find that 100 of the maxims occur at least four times, and some of them five times, while fully 500 are repeated at least once. At this rate, it is not wonderful that the book contains 'over 1,200,' although a matter of surprise that it does not contain over 12,000."

NOTES.

IT is certain that much sooner than the profession now realize, the question of how to grapple with the increasing volumes of law reports which, with increasing rapidity, keep pouring from the printing presses, will be forced upon the attention of every lawyer. A suggestion made by an exchange is so sensible and easy of adoption that we have wondered why judges do not avail themselves of it. This is that courts should adapt the length of their opinions to the novelty and the importance of the questions to be determined, and dispose of mere iterations of familiar rules on the authority of a leading case. For the convenience and economy of the profession the courts should not be expected to write opinions merely in deference to the estimate placed by counsel upon the cause, but should feel free to dispose of an appeal upon the bald authority of a leading case, if there is one which deserves to control the question, thus gaining space and time and opportunity for research upon questions which really contribute to the settlement of the law and the advancement of jurisprudence.

THE Chicago Bar Association, at its last meeting, had before it for discussion the report of the Committee on Legal Education, making various recommendations to the courts as to the mode of conducting examinations for admission to the bar. Amongst other things, the committee favored the examinations being carried on by written questions and answers. It may be said, without fear of contradiction, that this is the only mode by which the examiner can be certain of making his examination thorough, and of which, at the same time, the student can have nothing to complain. It is the only test which is really worth anything; the giving of half a dozen questions on such an extensive subject as the laws of our land, being certain to confuse the novice, who, having but little time to reflect, and being sometimes too modest to assert what he thinks to be the true answer, presents to his questioners the appearance of one who knows nothing of the subject, while, in fact, his only fault may be a want of self-possession. A duller, and at the same time, bolder youth may thus be successful, while his more meritorious companion signally fails, and this for no reason which should affect the result in an ordeal of this nature. To make an examination thorough and complete, questions should be propounded on as many subjects as possible, and the questions on each topic should only be limited when absolutely necessary. The candidate should be allowed a sufficient time to frame his answers, and the examiner should be careful not to reject him for a failure on a single subject, provided his average on the whole examination is up to the standard. The many branches of the subject, and the likelihood that after being admitted to the bar he may devote himself to a specialty, to the exclusion of all the other branches, should not be forgotten in this connection. In his last annual report, the Dean of the Harvard Law School has something to say on this question, which deserves the attention of all examining boards throughout the land.

THE President of the English Divorce Court, Mr. Justice Hannen, is the subject of an interesting sketch in one of the comic papers of that country. Since the days of Chancellor Thurlow, says this journal, no judge on the English bench ever looked so wise as Sir James Hannen. It is impossible to be in his court without being impressed with his almost episcopal dignity. Of the duties of an archdeacon it was truly said that they were wholly archidiaconal; and of the manners of Mr. Justice Hannen it may be said that they are eminently judicial. He does not say much as a judge, but he looks as few judges can look. His silence is austere. His nearest approach to humor is fretfulness. He never unbends or permits himself relaxation. A settled gloom hovers over the bench of the divorce court, and gravity, if not melancholy, has marked its president for her own. Indeed, it is well it should be so. In other courts there is room for light treatment of frivolous claims. There is such a process as the laughing of a case out of court; and a stupid client, though no wit himself, is often the source of wit in others. But it is felt that the divorce court stands on a wholly different footing. Even where there is neither disgrace nor dishonor, but only misconception and jealousy, there must always have been much mental anguish, and the class of men and the class of women who are found in the witness-box give an unfavorable view of humanity. Levity would be out of place in such gloomy surroundings. The president's chief duty is to look grave. He is not often troubled with difficult law points. Indeed, most of his work is matter of routine, and one of his chief duties is to stick to common-sense, and to be careful not to contradict his predecessors or himself. To talk sensibly and to look dignified are his chief duties, and he discharges both admirably. In many respects, the Divorce Court more nearly resembles a Vice-Chancellor's Court than a Common Law tribunal. There is more solemnity and less noise. The judge's sense of importance contributes to this, and the fact that, though in theory any barrister may be briefed, in effect the work is in a few hands, adds to the resemblance. In no way is the President's conduct conducive to this result. To all the counsel that appear before him he extends a courtesy which might be genial if it were not so pompously donnish. But this matter has its own attractions. The court is never the scene of disagreeable skirmishes between Bench and Bar, as in the time of one of his predecessors. A very able advocate was examining a witness. "Stop," said the Judge abruptly. The examination continued. "Stop," said the Judge, abruptly. The counsel asked yet another question. "Mr. James," said the Judge, "did you hear me say 'Stop?'" "I did, my lord," said the counsel; "but I thought from your lordship's tone that your lordship was only addressing the Usher." The President of the Probate and Divorce Division of the High Court of Justice is obviously a most important personage. He sits, for the most part, in solitary dignity and contemplates from an unchanging seat a slightly varying Bar. Silence, majestic, and at times almost comatose, he personates austere dignity in the sincerest appreciation of its own sublimity. Wit is out of place in his court, and humor, if it should blunder in, blunders out again as quickly as it can. The court is hushed and solemn. Questions are asked with bated breath. Cross-examination moves through a prescribed course. The judge flinches from the painful revelations, and is the moralist of the miseries of married life. And in all this the influence he exercises is good and healthy—if only it be not pushed too far. Under a less dignified president the divorce court would soon become a hotbed of scandalous curiosity. Sir James Hannen has done a service to morality in his successful efforts to reduce and keep in check this dangerous tendency of his court. If his work seems light, compared with that of other judges, and adequately recompensated, it is to be remembered amidst what painful scences he passes his days. There is much to shock and nothing to improve. As one after another the half-told tales of guilty love are committed to his note-book, it is no wonder the judge should look up with impatience and grow restive under weary iterance.